SCC No. 37209

IN THE SUPREME COURT OF CANADA
(ON APPEAL FOR THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

- and –

LAW SOCIETY OF UPPER CANADA

Respondent

- and –

ATTORNEY GENERAL OF ONTARIO, ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION, THE ADVOCATES' SOCIETY, INTERNATIONAL COALITION OF PROFESSORS OF LAW, NATIONAL COALITION OF CATHOLIC SCHOOL TRUSTEES', LAWYERS' RIGHTS WATCH CANADA, CANADIAN BAR ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CHRISTIAN LEGAL FELLOWSHIP, CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, START PROUD, OUTlaws, CANADIAN COUNCIL OF CHRISTIAN CHARITIES, UNITED CHURCH OF CANADA, LAW STUDENTS' SOCIETY OF ONTARIO, CANADIAN CONFERENCE OF CATHOLIC BISHOPS, SEVENTH-DAY ADVENTIST CHURCH IN CANADA, EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN HIGHER EDUCATION CANADA, LESBIANS GAY BISEXUALS AND TRANS PEOPLE OF THE UNIVERISTY OF TORONTO, BRITISH COLUMBIA HUMANIST ASSOCIATION, CANADIAN SECULAR ALLIANCE, EGALE CANADA HUMAN RIGHTS TRUST, FAITH, FEALTY & CREED SOCIETY, ROMAN CATHOLIC ARCHDIOCESE OF VANCOUVER, CATHOLIC CIVIL RIGHTS LEAGUE, FAITH AND FREEDOM ALLIANCE and WORLD SIKH ORGANIZATION OF CANADA

Interveners

[Style of Cause continued on inside cover]

FACTUM OF THE INTERVENER, BRITISH COLUMBIA HUMANIST ASSOCIATION
(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

Wesley J. McMillan
Hakemi & Ridgedale LLP
1500-888 Dunsmuir Street
Vancouver, BC V6C 3K4
Tel: 604-259-2269
Fax : 604-648-9170
Email : wmcmillan@hakemiridgedale.com

Counsel for the Intervener, British Columbia Humanist Association

Guy Régimbald
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-786-0197
Fax: 613-788-3559
Email: guy.regimbald@gowlingwlg.com

Ottawa Agent for the Counsel of the Intervener, British Columbia Humanist Association

SCC No. 37318

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

Appellant

- and -

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Respondents

- and -

LAWYERS' RIGHTS WATCH CANADA, NATIONAL COALITION OF CATHOLIC SCHOOL TRUSTEES', INTERNATIONAL COALITION OF PROFESSORS OF LAW, CHRISTIAN LEGAL FELLOWSHIP, CANADIAN BAR ASSOCIATION, THE ADVOCATES' SOCIETY, ASSOCIATION OF REFORMED POLITICAL ACTION (ARPA) CANADA, CANADIAN COUNCIL OF CHRISTIAN CHARITIES, CANADIAN CONFERENCE OF CATHOLIC BISHOPS, CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, LAW STUDENTS' SOCIETY OF ONTARIO, SEVENTH-DAY ADVENTIST CHURCH IN CANADA, BC LGBTQ COALITION, EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN HIGHER EDUCATION CANADA, BRITISH COLUMBIA HUMANIST ASSOCIATION, EGALE CANADA HUMAN RIGHTS TRUST, FAITH, FEALTY & CREED SOCIETY, ROMAN CATHOLIC ARCHDIOCESE OF VANCOUVER, CATHOLIC CIVIL RIGHTS LEAGUE, FAITH AND FREEDOM ALLIANCE, CANADIAN SECULAR ALLIANCE, WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND and WORLD SIKH ORGANIZATION OF CANADA

Interveners

ORIGINAL TO: **REGISTRAR**

COPIES TO:

Peter A. Gall, Q.C.
Donald R. Munroe, Q.C.
Benjamin J. Oliphant
Gall, Legge, Grant & Munroe LLP
1000-1199 West Hastings Street
Vancouver, BC V6E 3T5
Tel: 604-891-1152
Fax: 604-669-5101
Email: pgall@glgmlaw.com

Counsel for the Appellant, Law Society of British Columbia

Mark C. Power
Power Law
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4
Tel: 613-702-5561
Fax: 613-702-5561
Email: mpower@juristespower.ca

Ottawa Agent for the Counsel for the Appellant, Law Society of British Columbia

Kevin L. Boonstra
Jonathan Maryniuk
Kuhn & Company
320-900 Howe Street
Vancouver, BC V6Z 2M4
Tel: 604-684-8668
Fax: 604-684-2887
Email: kboonstra@kuhnco.net

Mark Jewett
Bennett Jones LLP
World Exchange Plaza
1900-45 O'Connor Street
Ottawa, ON K1P 1A4
Tel: 613-683-2328
Fax: 613-683-2323
Email: jewettm@bennettjones.com

Robert W. Staley
Ranjan K. Agarwal
Bennett Jones LLP
One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, ON M5X 1A4
Tel: 416-777-4857
Fax: 416-863-1716
Email: staleyr@bennettjones.com

Counsels of the Appellants/Respondents, Trinity Western University and Brayden Volkenant

Ottawa Agent for the Counsels for the Appellants/Respondents, Trinity Western University and Brayden Volkenant

Guy Pratte
Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON M5H 4E3
Tel: 416-350-2638
Fax: 416-367-6749
Email: gpratte@blg.com

Counsel for the Respondent, Law Society of Upper Canada

Nadia Effendi
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9
Tel: 613-237-5160
Fax: 613-230-8842
Email: neffendi@blg.com

Ottawa Agent for the Counsel for the Respondent, Law Society of Upper Canada

Andre Schutten
Association for Reformed Political Action (ARPA) Canada
130 Albert Street, Suite 1705
Ottawa, ON K1P 5G4
Tel: 613-297-5172
Fax: 613-249-3238
Email: andre@ARPACanada.ca

Counsel for the Intervener, Association for Reformed Political Action (ARPA) Canada

Chris G. Paliare
Joanna Radbord
Monique Pongracic-Speier
Paliare, Roland, Rosenberg, Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1
Tel: 416-646-4318
Fax: 416-646-4301
Email: chris.paliare@paliareroland.com

Counsel for the Intervener, The Advocates' Society

Barry W. Bussey
Philip A.S. Milley
1-43 Howard Ave
Elmira, ON N3B 2C9
Tel: 519-669-5137
Fax: 519-669-3291
Email: barry.bussey@cccc.org

Counsel for the Intervener, Canadian Council of Christian Charities

W.J. Sammon
Barnes, Sammon LLP
200 Elgin Street, Suite 400
Ottawa, ON K2P 1L5
Tel: 613-594-8000
Fax: 613-235-7578

Counsel for the Intervener, Canadian Conference of Catholic Bishops

Marie-France Major
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613-695-8855
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Counsel for the Intervener, Association for Reformed Political Action (ARPA) Canada

Jeffrey W. Beedell
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for the Counsel for the Intervener, The Advocates' Society

Eugene Meehan, Q.C.
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613-695-8855
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for the Counsel for the Intervener, Canadian Council of Christian Charities

Peter Barnacle
Immanuel Lanzaderas
Canadian Association of University Teachers
2705 Queensview Drive
Ottawa, ON K2B 8K2
Tel: 613-820-2270
Fax: 613-820-7244
Email: barnacle@caut.ca

Counsel for the Intervener, Canadian Association of University Teachers

Susan Ursel
David Grossman
Angela Westmacott, Q.C.
Ursel Phillips Fellows Hopkinson LLP
1200-555 Richmond Street West
Toronto, ON M5V 3B1
Tel: 416-969-3515
Fax: 416-968-0325
Email: sursel@upfhlaw.ca

Counsel for the Intervener, Canadian Bar Association

Derek B.M. Ross
Deina Warren
Christian Legal Fellowship
470 Weber Street, Suite 202
Waterloo, ON N2L 6J2
Tel: 519-208-9200
Fax: 519-208-3600
Email: execdir@christianlegalfellowship.org

Counsel for the Intervener, Christian Legal Fellowship

Rahool P. Agarwal
Kristine Spence
Norton Rose Fulbright Canada LLP
200 Bay Street
Royal Bank Plaza, South Tower, Suite 3800
Toronto, ON M5J 2Z4
Tel: 416-216-3943
Fax: 416-216-3930
Email: rahool.agarwal@nortonrose.com

Counsel for the Intervener, Law Students' Society of Ontario

Colleen Bauman
Goldblatt Partners LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Counsel for the Intervener, Canadian Association of University Teachers

Jeffrey W. Beedell
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for the Counsel for the Intervener, Canadian Bar Association

Eugene Meehan, Q.C.
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613-695-8855
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for the Counsel for the Intervener, Christian Legal Fellowship

Matthew J. Halpin
Norton Rose Fulbright Canada LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4
Tel: 613-780-8654
Fax: 613-230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Ottawa Agent for the Counsel for the Intervener, Law Students' Society of Ontario

Gerald D. Chipeur, Q.C.
Jonathan Martin
Grace MacKintosh
Miller Thomson LLP
3000, 700-9th Avenue SW
Calgary, AB T2P 3V4
Tel: 403-298-2425
Fax: 403-262-0007
Email: gchipeur@millerthomson.com

Counsel for the Intervener, Seventh-day Adventist Church in Canada

Karey Brooks
Robert Freedman
Elin Sigurdson
JFK Law Corporation
640 – 1122 Mainland Street
Vancouver, BC V6B 5L1
Tel: 604-687-0549
Fax: 604-687-2696
Email: kbrooks@jfklaw.ca

Counsel for the Intervener, BC LGBTQ Coalition

Albertos Polizogopoulos
D. Geoffrey Cowper, Q.C.
Kristin Debs
Geoffrey Trotter
Vincent Dagenais Gibson LLP
260 Dalhousie Street, Suite 400
Ottawa, ON K1N 7E4
Tel: 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca

Counsel for the Intervener, Evangelical Fellowship of Canada

Eugene Meehan, Q.C.
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613-695-8855
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for the Counsel for the Intervener, Seventh-day Adventist Church in Canada

Guy Régimbald
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-786-0197
Fax: 613-788-3559
Email: guy.regimbald@gowlingwlg.com

Ottawa Agent for the Counsel of the Intervener, BC LGBTQ Coalition

Albertos Polizogopoulos
D. Geoffrey Cowper, Q.C.
Kristin Debs
Geoffrey Trotter
Vincent Dagenais Gibson LLP
260 Dalhousie Street, Suite 400
Ottawa, ON K1N 7E4
Tel: 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca

Counsel for the Intervener, Christian Higher Education Canada

Eugene Meehan, Q.C.
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613-695-8855
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

Counsel for the Intervener, International Coalition of Professors of Law

Marie-France Major
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613-695-8855
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Counsel of the Intervener, International Coalition of Professors of Law

Tim Dickson
JFK Law Corporation
340 – 1122 Mainland Street
Vancouver, BC V6B 5L1
Tel: 604-687-0549
Fax : 604-687-2696
Email : tdickson@jfklaw.ca

Counsel for the Intervener, Canadian Secular Alliance

Guy Régimbald
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-786-0197
Fax: 613-788-3559
Email: guy.regimbald@gowlingwlg.com

Ottawa Agent for the Counsel for the Intervener, Canadian Secular Alliance

Steven Barrett
Adriel Weaver
Goldblatt Partners LLP
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8
Tel: 416-979-6422
Fax: 416-591-7333

Counsel for the Intervener, Egale Canada Human Rights Trust

Colleen Bauman
Goldblatt Partners LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Counsel for the Intervener, Egale Canada Human Rights Trust

Blake Bromley
Benefic Law Corporation
1250 – 1500 West Georgia Street
P.O. Box 62
Vancouver, BC V6G 1Z6
Tel : 604-683-7006
Fax : 604-683-5676
Email : blake@beneficgroup.com

Counsel for the Intervener, Faith, Fealty & Creed Society

Michael J. Sobkin
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for the Counsel for the Intervener, Faith, Fealty & Creed Society

Gwendoline Allison
Foy Allison Law Group
207 – 2438 Marine Drive
West Vancouver, BC V7V 1L2
Tel: 604-922-9282
Fax: 604-922-9283
Email: Gwendoline.allison@foyallison.com

Counsel for the Interveners, Roman Catholic Archdiocese of Vancouver, Catholic Civil Rights League and Faith and Freedom Alliance

Albertos Polizogopoulos
Vincent Dagenais Gibson LLP
260 Dalhousie Street, Suite 400
Ottawa, ON K1N 7E4
Tel: 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca

Ottawa Agent for the Counsel for the Interveners, Roman Catholic Archdiocese of Vancouver, Catholic Civil Rights League and Faith and Freedom Alliance

Julius H. Grey
Grey, Casgrain
1155 René-Lévesque West, Suite 1715
Montréal, QC H3B 2K8
Tel: 514-288-6180
Fax : 514-288-8908
Email : jhgrey@greycasgrain.net

Counsel of the Intervener, Lawyers' Rights Watch Canada

Guy Régimbald
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-786-0197
Fax: 613-788-3559
Email: guy.regimbald@gowlingwlg.com

Ottawa Agent for the Counsel of the Intervener, Lawyers' Rights Watch Canada

Janet Winteringham, Q.C.
Jessica Lithwick
Robyn Trask
Winteringham MacKay
620 – 375 Water Street
Vancouver, BC V6B 5C6
Tel: 604-659-6060
Fax : 604-687-2945
Email : jwinterinham@wmlaw.ca

Counsel for the Intervener, West Coast Women's Legal Education and Action Fund

Michael J. Sobkin
331 Somerset Street West
Ottawa, ON K2P 0J8
Tel: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for the Counsel for the Intervener, West Coast Women's Legal Education and Action Fund

Avnish Nanda
Balpreet Singh Boparai
Nanda & Company
3400 Manulife Place
10180 – 101 Street NW
Edmonton, AB T5J 4K1
Tel: 780-801-5324
Fax: 587-318-1391
Email: avnish@nandalaw.ca

Counsel for the Intervener, World Sikh Organization of Canada

Marie-France Major
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613-695-8855
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Counsel of the Intervener, World Sikh Organization of Canada

Eugene Meehan, Q.C.
Daniel D. Santoro
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613-695-8855
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

Counsel for the Intervener, National Coalition of Catholic School Trustees'

Thomas Slade
Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3
Tel: 613-695-8855
Fax: 613-695-8580
Email: tslade@supremeadvocacy.ca

Ottawa Agent for the Counsel for the Intervener, National Coalition of Catholic School Trustees'

S. Zachary Green
Josh Hunter
Attorney General of Ontario
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9
Tel: 416-326-8517
Fax: 416-326-4015
Email: Zachary.green@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

Robert E. Houston, Q.C.
Burke-Robertson
441 MacLaren Street, Suite 200
Ottawa, ON K2P 2H3
Tel: 613-236-9665
Fax: 613-235-4430
Email: rhouston@burkerobertson.com

Ottawa Agent for the Counsel for the Intervener, Attorney General of Ontario

Marlys A. Edwardh
Vanessa Payne
Goldblatt Partners LLP
Box 180
1039-20 Dundas Street West
Toronto, ON M5G 2G8
Tel: 416-979-4380
Fax: 416-979-4430
Email: medwardh@goldblattpartners.com

Counsel for the Interveners, Start Proud and OUTlaws

Colleen Bauman
Goldblatt Partners LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Counsel for the Interveners, Start Proud and OUTlaws

Alan L.W. D'Silva
Alexandra Urbanski
Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9
Tel: 416-869-5204
Fax: 416-947-0866
Email: adsilva@stikeman.com

Counsel for the Intervener, Canadian Civil Liberties Association

Nicholas Peter McHaffie
Stikeman Elliott LLP
1600 – 500 O'Connor Street
Ottawa, ON K1P 6L2
Tel: 613-566-0546
Fax: 613-230-8877
Email: nmchaffie@stikeman.com

Ottawa Agent for the Counsel for the Intervener, Canadian Civil Liberties Association

Sean Dewart
Tim Gleason
Dewart Gleason LLP
102 – 366 Adelaide Street West
Toronto, ON M5V 1R9
Tel: 416-971-8000
Fax: 416-971-8001
Email: sdewart@dgllp.ca

Counsel for the Intervener, United Church of Canada

John Norris
David Brees
100 – 116 Simcoe Street
Toronto, ON M5H 4E2
Tel: 416-596-2960
Fax: 416-596-2598
Email: john.norris@simcoechambers.com

Counsel for the Intervener, Criminal Lawyers' Association (Ontario)

Matthew Estabrooks
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Tel: 613-786-0211
Fax: 613-788-3573
Email: matthew.estabrooks@gowlingwlg.com

Ottawa Agent for the Counsel for the Intervener, Criminal Lawyers' Association (Ontario)

Angela Chaisson
Marcus McCann
197 Spadina Ave, Suite 402
Toronto, ON M5T 2C8
Tel : 647-567-3536
Fax : 647-977-9074
Email : law@chaisson.ca

Counsel for the Intervener, Lesbians Gays Bisexuals and Trans People of the University of Toronto

Yael Wexler
Fasken Martineau DuMoulin LLP
55 Metcalfe Street, Suite 1300
Ottawa, ON K1P 6L5
Tel: 613-696-6860
Fax: 613-230-6423
Email: ywexler@fasken.com

Ottawa Agent for the Counsel for the Intervener, Lesbians Gays Bisexuals and Trans People of the University of Toronto

TABLE OF CONTENTS

PARTS I AND II – OVERVIEW AND POSITION

1. While these cases stand to be decided on a *Doré* analysis, "questions about the identity of the person(s) whose section 2(a) rights have been interfered with lurk just below the surface of that inquiry."[1]

2. The wording of the *Charter* does not require s. 2(a) rights be extended to organizations. It provides that right to "everyone", not every legal person. Furthermore, it is trite that an organization cannot itself have a religion. As such, any decision to extend to s. 2(a) rights to organizations is necessarily a policy decision.

3. The rationale for extending s. 2(a) rights to organizations is the fact that, for many, religion has an important communal aspect. That, however, cannot justify the extension of religious freedoms to organizations. To do so does not enhance religious protection for all but rather, endorses religious oligarchy for individuals controlling organizations that obtain the benefit of s. 2(a). Further, refusing to extend the protection does not make state action toward organizations a *Charter*-free zone. Individuals may always assert their s. 2(a) and s. 2(d) rights.

4. The British Columbia Humanist Association ("BCHA") is concerned that the extension of s. 2(a) rights to organizations will have significant and deleterious effects on Canadians and Canadian society. Such will result in state-tolerated religious preferences for access to such necessities as education, medical care and employment.

5. Should s. 2(a) protection be extended to organizations, the BCHA, using human rights legislation as its guide, proposes a narrower test than that articulated by the minority of this Court in *Loyola.* The proposed test balances the concerns of protecting the communal aspect of religion with those of too liberally granting organizations s. 2(a) rights and the impact that will have on individual members of organizations, the public and Canadian society at large.

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[1] Chan, Kathryn, "Identifying the Institutional Religious Freedom Claimant" (June 29, 2017) (2017) 95 Cdn Bar Review (Forthcoming) at p. 7 [Chan, "Identifying"].

PART III – ARGUMENT

A. An Organization Cannot Have a Religion or a s. 2(a) Right

6. The religious freedoms afforded by s. 2(a) of the *Charter* are inherently individual in nature and focused on a person's subjective beliefs and perceived personal relationship with the divine.

7. The purpose of freedom of religion, as articulated by this Court, is "to ensure that society does not interfere with profoundly personal beliefs"[2] and that "every individual [is] free to hold and to manifest whatever beliefs and opinions his or her conscience dictates"[3].

8. Consequently, the concept of freedom of religion is clearly both personal and subjective in nature, as well as "integrally linked with an individual's self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right".[4]

9. This Court has also noted that "freedom of religion… has both individual and collective aspects"[5] and this Court has recognized "that individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice"[6].

10. Nevertheless, the communal aspect of religion cannot result in the ascription of religion to an organization that is incapable of having a religion or religious beliefs.

11. As noted by this Court, a corporation cannot possess a belief.[7] It cannot feel. It cannot engage in abstract thought. It cannot choose. It merely does, or does not. An organization is a legal construct. Societies and corporations exist because legislation authorizes their creation.

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[2] *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at ¶97 *per Dickson J.* [*Edwards Books*]
[3] *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295 at ¶123 *per Dickson J.*
[4] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at ¶42 *per Iacobucci J.*
[5] *Edwards Books, supra* at ¶140 *per Dickson J.*
[6] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at ¶33 *per Abella J.* [*Loyola*]
[7] *Edwards Books, supra* at ¶153 *per Dickson J.*

12. The use of the word "everyone" in s. 2 of the *Charter* is not an invitation to anthropomorphize organizations so as to provide them with rights which logically, they simply cannot possess. As this Court stated, the collective aspect of freedom of religion "does not, however, transform the essential claim -- that of the individual claimants… -- into an assertion of a group right".[8] Thus, although it is possible for individuals to arrange themselves into an organization for the purpose of promoting their religious beliefs, this does not impress the organization itself with a religious belief.

13. It has been held that the use of the word "everyone" at s. 2(a) means "all human beings and all entities that are capable of enjoying the benefit" conferred by a certain *Charter* right.[9]

14. Consistent with that, this Court in *Irwin Toy* held that a corporation could not avail itself of s. 7 of *Charter* as the use of the word "everyone" in s. 7 "excludes corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and includes only human beings."[10]

15. Nevertheless, the minority in *Loyola* proposed to expand the scope of s.2(a) rights to encompass organizations on the basis of the "collective aspect of religious freedom"[11].

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[8] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at ¶ 31, *per McLachlin C.J.*

[9] *Southam Inc. v. Investigation and Research of the Combines Investigation Branch*, 1982 CanLII 1136 (AB QB) at ¶29 [Emphasis added]. While that decision was overturned by the Court of Appeal, which decision was upheld by this Court, this Court noted in *R. v. CIP Inc.*, [1992] 1 S.C.R. 843 at p. 855, that neither the Alberta Court of Appeal nor this Court took issue with the trial judge's conclusion. Indeed, subsequent jurisprudence appears to have, at least implicitly, addressed the issue of corporate assertion of *Charter* rights by asking if the corporate claimant is capable of enjoying the benefit of the asserted right.

[10] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 1004 *per Dickson C.J. and Lamer and Wilson JJ.*

[11] *Loyola, supra* at ¶33 *per Abella J.*

16. Given that an organization cannot have a religion, the minority's decision to expand the right to organizations is necessarily a policy decision. The wording of the *Charter* does not demand it.

17. Respectfully, the minority's approach fails to take into account the issues already raised and the deleterious societal impact of expanding the s. 2(a) right to organizations.

18. Section 2(a) rights contain both positive and negative aspects that are equally deserving of protection.[12] Moreover, the religious freedoms of individuals are limited by the rights and freedoms held by others.[13]

19. The conflict of rights that may emerge with respect to the assertion of religious freedoms by individual claimants are limited. The same is not so where there may be an organizational claimant.

20. An organization's realization of the positive aspect of the right may conflict with the rights and legitimate interests of more persons and in more impactful ways than an individual's exercise of his or her freedom of religion ever could.

21. With this in mind, there is a strong policy basis for resisting the temptation to expand s. 2(a) rights to organizations.

22. Large organizations like TWU, and others that engage as a matter of practice with the broader public, undoubtedly have a much broader and significant impact on the rights of others, including students, staff and any individuals who interact with them. Consequently, the expansion of s. 2(a) rights to organizations will allow these groups to significantly impose on the "negative aspect" of the religious freedoms of others; that is, not to be compelled to belong to a particular religion or to act contrary to their own religious beliefs.

23. The simple response to this concern is that individuals are not compelled to deal with TWU and other religious organizations. That, however, ignores the role and impact organizations

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[12] *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village),* [2004] 2 S.C.R. 650 at ¶65 *per McLachlin C.J.*

[13] *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at ¶72 *per La Forest J.*

have within Canadian society in, for example, employment and delivery of key services. Moreover, it disregards the message sent that the government and *Charter* values have no role to play in ameliorating religious-based segregation and ostracizing in the public sphere. This leads to a society in which there are hospitals, schools and shops for Christians, others available only to Muslims, still others for atheists, and so on, and so forth. Such is anathema to the pluralistic and accepting Canadian society of which many in this country rightly take great pride.

24. Indeed, living and participating in a pluralistic and secular society benefits those of all faiths. However, it also means that persons of all faiths, and those of no faith, must necessarily accept that the practice and promotion of any religion or non-theism has its limits.

25. An organizational religious right may result in the compulsion of some members of an organization, or the public, to act in a manner contrary to their own beliefs due the overriding organizational right. Because the organizational claimant is not itself a state actor, those persons would have no recourse. Further, it may impose the beliefs of only a select few members of the organization's board on the whole of the organization or organization's community. As the Community Covenant in the cases at bar demonstrates, the coerced conduct created by an organizational right may apply 24 hours a day, seven days a week, to activities with no connection at all to the organization or its purpose.

26. It must be borne in mind that the policy rationale for expanding the s. 2(a) right to organizations is a recognition of the communal aspect of religion and an apparent concern that, absent an organizational right, there will be some gap in *Charter* protection for individuals. However, refusing to recognize an organizational right does not make the communal aspect of religion a *Charter*-free zone. Where state action impacts the communal aspects of religion, individuals may still assert breaches of their own individual s. 2(a) and s. 2(d) freedom of association rights.

27. Moreover, under the approach to administrative decision-making outlined in *Doré*, administrative bodies are empowered and, in fact, required, to consider fundamental *Charter*

values. As a result, an administrative decision need not directly engage an individual's or organization's *Charter* rights in order for *Charter* values to come into play.[14]

B. The Minority's Test in *Loyola* is Overbroad and In Need of Clarification

28. If this Court holds that an organization can have freedom of religion in its own right, the BCHA submits that the approaches taken by the courts below, and test proposed by the minority in *Loyola*, should be rejected as being overbroad and, in any event, requiring clarification.

29. In *Loyola*, the minority stated that an organization "meets the requirements for s. 2(a) protection if (1) it is constituted primarily for religious purposes, and (2) its operation accords with these religious purposes."[15]

30. If that threshold test is met, the organizational claimant must show "that the claimed belief or practice is consistent with both the purpose and operation of the organization."[16] Finally, if that is demonstrated, the court must ask whether the impugned state action "interfere[s] with [the organization's] ability to act in accordance with this belief, in a manner that is more than trivial or insubstantial".[17]

31. In contrast, the courts below have taken the approach of simply accepting at face value an organizational claimant's description of itself and its purpose.

32. The minority's test in *Loyola* lacks clarity in determining when a religious purpose is the primary purpose of the organization. Indeed, many organizations are constituted to engage in a non-religious activity or provide a non-religious service within a religious context. Is the activity the primary purpose, or is it the context in which that activity takes place? The answer will often depend on who is asked. The end user (e.g. student, patient or customer)

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[14] *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 at ¶35 *per Abella J.*[*Doré*]
[15] *Loyola, supra* at ¶100 *per McLachlin C.J. and Moldaver J.*
[16] *Loyola, supra* at ¶138 *per McLachlin C.J. and Moldaver J.*
[17] *Loyola, supra* at ¶140 *per McLachlin C.J. and Moldaver J.*

will likely focus on the activity. The organization itself may put more focus on the religious context. The state actor is a third person that may have yet a different perspective.

33. Professor Chan provides an excellent analysis of the difficulties in determining an organization's purpose in the context of the cases now before this Court. She notes that determining organizational purpose requires looking at the appropriate constituting documents (not merely what the organizational claimant asserts is its purpose), recognizing the legal constraints imposed by those documents on an organization's ability to define its purpose, and the difficulty that may nevertheless persist in finding a primary purpose.[18]

34. Professor Chan's analysis highlights the problems of an unclear test. She notes that TWU's constituting documents state its object is to provide a university education "for people of any … creed". This seems to shut the door on any suggestion that compelled observance of the mores of any one religion or religious viewpoint is really in furtherance of TWU's purpose. Nevertheless, despite being aware of the minority's test in *Loyola*, it appears that the lower courts in this case were not prepared to look behind TWU's stated purpose.

35. The next two stages of the minority's analysis in *Loyola* (determining whether the operation of the organization accords with its religious purpose, and determining whether the claimed belief or practice is consistent with both the purpose and operation of the organization) focus more narrowly on the operation of the organization and, more specifically, the belief or practice in issue. However, the proposed test sets an unjustifiably low bar that the operation "accord" with the religious purpose, and that belief or practice be merely "consistent" with the organizational purpose and operation.

36. It is difficult to imagine an organizational claimant whose operation does not accord with its religious purpose, or whose professed belief or practice is not, at a minimum, consistent with the organization's operation and purpose. The minority's proposed test weeds out only those claimants who are acting *contrary* to their religious purpose.

37. Furthermore, it is entirely possible that two contrary and incompatible practices would both meet the test. This, of course, is more likely when the organizational purpose includes terms

[18] Chan, "Identifying", *supra* at pp. 9 – 13

that defy a commonly understood definition (i.e. "Christian"). Professor Chan posits the example of TWU's board being controlled by progressive United Church ministers who amend the Community Covenant to expressly permit same-sex relationships. She notes that, based on TWU's objects as set out in its constituting documents, neither version of the covenant can be said to not be in accord or consistent with TWU's religious purpose.[19]

38. We then see that what is *Charter*-protected is nothing more than the views of those individuals that happen to control an organization's board at any given time. The desire to protect the communal aspect of religion will have thus resulted in *Charter* protection for a select few to impose their view of their religion on an entire community of believers, and the public with whom they engage. The central focus – protection of the communal aspect of religion for a community of persons – has thus morphed into *Charter*-protected religious oligarchy.

39. Finally, the last part of the test misplaces the focus of the inquiry on the organization itself, rather than the individuals practicing their religion through the organization. This flows naturally from the fact that it is only individuals who can have and practice religion.

C. The BCHA's Proposed Test

40. If this Court is prepared to extend s. 2 (a) rights to organizations, bearing in mind the concerns raised above, the BCHA submits that there must be a meaningful test applied to any organizational claim to a s. 2(a) right. That is, as described by Professor Chan, a "first-order" question: which organizations may seek to assert a s. 2(a) right?[20]

41. In answering this question, one must bear in mind that the rationale for recognizing an organizational right to freedom of religion is to ensure protection of individuals' freedom of religion. An organization is merely a vehicle for its members' practice of religion.

42. The notion of recognizing an organizational right to religious freedom is not new in Canada. Human rights legislation in numerous provinces and territories include exceptions from their

[19] Chan, "Identifying", *supra* at pp. 12 – 13
[20] Chan, "Identifying", *supra* at p. 3

ambit, or part thereof, for certain organizations and activities based on religion. The thresholds for these exceptions are variously framed as requiring that the organization:

a. "has a primary purpose of the promotion of the interests and welfare of an identifiable group or class of persons characterized by a common religion"[21];

b. "is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination"[22];

c. "is primarily engaged in serving the interests of persons identified by their religion"[23];

d. "is composed exclusively or primarily of persons having the same religious beliefs, and, is not operated for profit"[24];

e. "is primarily engaged in serving the interests of a group of persons identified by that prohibited ground of discrimination"[25];

f. is "exclusively religious … and that is operated primarily to foster the welfare of a religious group with respect to persons of the same religion"[26]; and

g. is "operated primarily to foster the welfare of a religious group"[27].

43. This legislation reflects a communal wisdom about organizational religion and, importantly, its interaction and impact on the rights and interests of members of the broader public.

44. What one can see on reviewing that legislation is that the exception for organizations based on religion is narrowly focused. First, the organization must be not-for-profit.

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[21] *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 41
[22] *Human Rights Code*, R.S.O. 1990, c. H.19, s. 18
[23] *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 16(10)
[24] *Alberta Human Rights Act*, R.S.A. 2000, C. A-25.5, s. 3(3)
[25] *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1, s. 11(3)
[26] *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 6(c) and *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 10(2)
[27] *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 7(5) and *Human Rights Act*, S. Nu 2003, c. 12, s. 9(6)

45. Second, the organization's *raison d'etre* must be to promote the welfare of members of a particular religious community.

46. If there is to be room for an organizational s. 2(a) claimant, the BCHA submits that such a claimant must meet the threshold test of satisfying the court that it is not operated for profit and is primarily engaged in promoting the welfare of an identifiable group or class of persons characterized by a common religion.

47. If that is satisfied, one must the consider the specific belief or practice in issue. Applying the test for an individual, appropriately modified, the questions become: (1) Is the belief or practice consistent with, and in furtherance of, the promotion of the welfare of those religious persons? (2) Does the impugned action interfere, in a manner that is non-trivial or insubstantial, with the promotion of the welfare of those religious persons?

48. This part of the test must focus on the specific belief or practice in issue. That focus must be done in context. Specific practices, for example, compulsory codes of conduct, may engage s. 2(a) rights in some contexts and not in others. Those different contexts may arise within the same organization. A context-specific focus recognizes that an organization may engage in a variety of activities, not all of which are sufficiently related to the organization's purpose to attract *Charter* protection. For example, a "religious organization" may engage in activities directed to or for the benefit of its members (e.g. advocacy or religious-based counselling) and other activities that have no religious content (e.g. the operation of thrift stores). The former may engage the organization's s. 2(a) rights whereas the latter will not.

PART IV& V – COSTS AND ORDER SOUGHT

49. The BCHA does not seek costs and ask that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Wesley McMillan and Kaitlyn Meyer
Counsel for the British Columbia Humanist Association

PART VI – TABLE OF AUTHORITIES

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